Lina Soo v Ngu Chu Chiong & Anor

HIGH COURT (KUCHING) — DIVORCE PETITION NO KG 9-91-II
MUHAMMAD KAMIL J
20 FEBRUARY 1999

Civil Procedure *— Jurisdiction — High Court — Whether High Court has jurisdiction to hear an application to vary a maintenance order where the order was originally granted by another High Court of equal jurisdiction*

Family Law *— Financial obligation — Maintenance order — Application to vary — Change of circumstances — Time for application — Mode of application — Law Reform (Marriage and Divorce) Act 1976 ss 47, 83 & 96 — Divorce and Matrimonial Proceedings Rules 1980 r 91(1)(b)*

The petitioner applied by way of summons-in-chamber for a variation of the maintenance order under s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') on the ground that there had been material changes in the circumstances affecting the child of the marriage and the life of the petitioner over the past 10 years. The petitioner had requested that the maintenance be doubled from RM1,500 per month to RM3,000 per month. The respondents raised preliminary objections on the following grounds: (i) the application should be made to High Court I — and not to High Court II as in this case — since the consent order of maintenance was made by the former; (ii) the application should be made in Form 11 and not by way of summons; (iii) the application for ancillary relief in the main action had been struck out; and/or (iv) the application was mala fide and vexatious.

Held, allowing the petitioner's application:

(1) Since the two High Courts in Kuching — ie High Court I and II — are of equal jurisdiction, it does not matter in which High Court the application is filed. The present application made in High Court II is correct and proper even though the consent order of maintenance was made by High Court I (see p 399A–B).

(2) Sections 83 and 96 of the Act show that the court has the power to vary the maintenance order when there is substantial change of circumstances of the petitioner or the respondent. Thus, the application under s 83 of the Act was procedurally correct (see p 399F–G).

(3) Since there is no time frame within which the petitioner must bring an application to vary a consent order, the petitioner may bring such application at any time as the occasion arises. Moreover, there is no evidence to show that the application was mala fide and vexatious (see p 400B).

A [**Bahasa Malaysia summary**

Pempetisyen memohon melalui saman dalam kamar untuk pengubahan perintah nafkah di bawah s 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') atas alasan bahawa terdapat perubahan yang penting di dalam hal keadaan yang membawa kesan kepada anak dari perkahwinan dan kehidupan pempetisyen dalam 10 tahun yang lepas. Pempetisyen telah memohon supaya nafkah digandakan dari RM1,500 sebulan kepada RM3,000 sebulan. Penentang-penentang telah menimbulkan bantahan awal atas alasan-alasan yang berikut: (i) permohonan tersebut seharusnya dibuat kepada Mahkamah Tinggi I — dan bukannya Mahkamah Tinggi II seperti dalam kes ini — memandangkan perintah nafkah persetujuan telah dibuat oleh Mahkamah Tinggi I; (ii) permohonan tersebut seharusnya dibuat dalam Borang 11 dan bukan menerusi saman dalam kamar; (iii) permohonan untuk relief sampingan di dalam tindakan utama telah dibatalkan; dan/atau (iv) permohonan tersebut adalah mala fide dan menyusahkan.

Diputuskan, membenarkan permohonan pempetisyen:

(1) Memandangkan dua Mahkamah Tinggi di Kuching — iaitu Mahkamah Tinggi I dan II — mempunyai bidang kuasa yang sama, adalah tidak penting dalam Mahkamah Tinggi yang manakah permohonan tersebut difailkan. Permohonan semasa yang dibuat di Mahkamah Tinggi II adalah betul dan wajar walaupun perintah nafkah persetujuan diberikan oleh Mahkamah Tinggi I (lihat ms 399A–B).

(2) Seksyen-seksyen 83 dan 96 Akta tersebut menunjukkan bahawa mahkamah mempunyai kuasa untuk mengubah perintah persetujuan di mana terdapat perubahan yang besar dalam hal keadaan pempetisyen atau penentang. Justeru itu, permohonan di bawah s 83 Akta tersebut adalah betul dari segi prosedur (lihat ms 399F–G).

(3) Oleh kerana tidak terdapat rangka masa di dalam mana pempetisyen mesti membawa satu permohonan untuk mengubah satu perintah persetujuan, pempetisyen boleh membawa satu permohonan pada bila-bila masa mengikut kejadian yang timbul. Tambahan pula, tidak terdapat sebarang keterangan untuk menunjukkan bahawa permohonan tersebut adalah mala fide dan menyusahkan (lihat ms 400B).]

Notes

For cases on jurisdiction of High Court, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2913 – 2955.

For cases on application to vary maintenance order, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 2001 – 2002.

Cases referred to

Dato Low Nam Hui v Vu Siew Chin [1994] 1 MLJ 129 (refd)
Foster v Foster [1964] 3 All ER 541 (refd)
Hall v Hall [1915] P 105 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 2(1), 47, 83, 96
Divorce and Matrimonial Proceedings Rules 1980 rr 2(1), 56, 63(1), 65, 91(1)(b)

Ernest Chua (*Ernest Chua & Co*) for the petitioner
Chong Siew Chiang (*Chong Brothers*) for the respondents

Cur Adv Vult

Muhammad Kamil J: This is the petitioner's application by summons-in-chambers under s 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') for a variation of the maintenance order made on 14 June 1989. In support of the application, the affidavit affirmed on 2 November 1998 by the petitioner stated that there had been material changes in the circumstances affecting the child of the marriage, namely Emily Jasmine Ngu Beixe, and the life of the petitioner over the past 10 years. Emily is now 15 years old and her needs have increased, and given the high cost of living today, the petitioner had requested that the maintenance be doubled from RM1,500 per month to RM3,000 per month.

The respondents had raised preliminary objections on the following grounds:

(1) the application is made in the wrong proceedings;
(2) the application is made by way of a wrong mode;
(3) the application for ancillary relief in the main action had been struck out by this honourable court; and/or
(4) the application is mala fide and vexatious.

Ground 1

The respondents' submitted that the consent order of maintenance was made by High Court I, and therefore it should follow that an application to vary the order should be made to the High Court I.

Learned counsel for the petitioner submitted that under s 2(1) of the Act, the word 'Court' means the High Court or a judge thereof; and under s 2(1) of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'), the word 'judge' means a judge of the High Court. Therefore, although the earlier proceedings were heard by High Court I and this application is in High Court II, it is not improper and quite in order.

Unlike in large cities, in Kuala Lumpur, for example where there are a number of courts, a court is designated to hear a certain type of case, eg matrimonial matters only, then it is expected that all matrimonial cases be

registered in the particular court. In Kuching currently, there are two High Courts. Both High Court I and II are courts of equal jurisdiction and it does not matter in which High Court this application is filed. There is no provision in the law that prohibits a matter which is heard by one judge of a High Court to be later heard by another High Court judge unless it is a continuous hearing in respect of one application. In my view, the personality of a judge is not the criteria that determines who should hear the proceedings. I hold that this application made in this court is correct and proper.

Ground 2

Learned counsel for the respondents submitted that the mode of application for ancillary relief shall be made by way of Form 11, under r 56 of the Rules. The provision is mandatory as the word 'shall' is used in r 56. He cited in support the case of *Dato Low Nam Hui v Vu Siew Chin* [1994] 1 MLJ 129. The petitioner here did not conform to the provisions of r 63, which states:

> An application for a variation order shall be supported by an affidavit by the applicant setting out full particulars of his property and income and the grounds on which the application is made.

Upon filing Form 11 or 13 the registrar shall fix a date for the investigation of the application for ancillary relief under r 65.

Learned counsel for the petitioner argued that this application is made under s 83 of the Act. Rule 65 of the Rules had been complied with by the petitioners at the first instance in the hearing of the judicial separation in 1988. By r 91(1)(b) it is specifically provided that every application in matrimonial proceedings shall, if the proceedings are pending in the High Court be made by summons.

It is trite law that the court has the power to vary the maintenance order when there is a substantial change of circumstances of the petitioner or the respondent. It is clear from ss 83 and 96 of the Act the court may vary a consent order under change of circumstances. Section 47 provides that the court may follow as nearly as may be, or in conformity with the principles as applied in an English court. In exercising its powers of variation, the court may have regard to all the circumstances of the case including any change in any of the matters to which the court was required to have regard when making the order to which the application relates — see para 129 at p 825 in *Rayden on Divorce* (13th Ed).

In *Foster v Foster* [1964] 3 All ER 541 the court held that in exercising its power to vary a consent order the court must not consider the question of financial provisions de novo, but must proceed on the basis that the previous original order was correctly made and examine the extent to which the respective positions of the parties have changed since the date of the order. In an earlier Court of Appeal case of *Hall v Hall* [1915] P 105, Lord Cozens-Hardy MR said:

> When an application is made for revision, and when the original order was made until further order it seems to me that the court ought to have regard to

all the circumstances of the case in the same manner as if those circumstances had existed at the date of the original order. A

I hold that the application under s 83 of the Act is procedurally correct.

Ground 3 and 4

There is no time frame within which the petitioner must bring an application to vary a consent order. Where there is substantial change of circumstances the petitioner may bring an application at any time as the occasion arises. In the instant case, there is no evidence to show that the application is mala fide and vexatious. B

In the circumstances, I would overrule the objections raised by the respondents with costs. As the respondents did not dispute the amount asked for by the petitioner, I hold that the respondents are agreeable to the amount. In the circumstances, the order of maintenance is varied to RM3,000 per month, effective from the date of this application. C

Application allowed. D

Reported by Tan Kah Bee

E

F

G

H

I